

IN THE CHANCERY COURT OF HICKMAN COUNTY, TENNESSEE

KEVIN P. LAVENDER, In his official)
capacity as Commissioner-In-)
Possession of Sentinel Trust Company)
and Receivership Management, Inc.,)
Receiver of Sentinel Trust Company,)
Plaintiffs,) No. 4980
v.)
DANNY N. BATES, et al.,)
Defendants.)

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT FILINGS

I. Introduction

As allowed by this Court's Order, entered on October 7, 2009, Plaintiffs file their Reply to the various Responses Defendants have submitted to Plaintiffs' Motion for Summary Judgment.¹ For the reasons stated herein, none of the Defendants' various Responses provide any reason or ground to deny the pending Motion for Summary Judgment. Accordingly, Plaintiffs request that the Court enter an order granting

¹ Defendants, supposedly *pro se*, have filed pleadings responsive to the pending Motion for Summary Judgment with various titles. Defendant Danny N. Bates has filed a "Motion to Dismiss Plaintiffs' Motion for Summary Judgment and to Dismiss Plaintiffs' Complaint," which will be referred to as "Danny Bates' Response." Deanna June Bates (who goes by the name of "June Bates") has filed a "Motion to Dismiss Plaintiffs' Motion for Summary Judgment and Response to Plaintiffs' Statement of Undisputed Facts," which will be referred to as "June Bates' Response." Defendant Clifton T. Bates (who goes by the name of "Todd Bates") has filed a "Motion to Dismiss Plaintiffs' Motion for Summary Judgment and Response to Plaintiffs' Statement of Undisputed Facts," which will be referred to as "Todd Bates' Response." And Defendant Gary L. O'Brien has filed a "Motion to Dismiss Plaintiffs' Motion for Summary Judgment and Response to Plaintiffs' Statement of Undisputed Facts," which will be referred to as "Gary O'Brien's Response."

summary judgment in favor of Plaintiffs and ordering the relief requested in the pending Motion for Summary Judgment.

II. Pro Se Litigant Standard

Defendants Danny Bates, June Bates, Todd Bates and Gary O'Brien² have filed their respective Responses pro se. The Court entered an Order on February 4, 2010 raising questions as to whether Danny Bates had prepared the Responses of June Bates, Todd Bates and Gary O'Brien. But for purposes of this Reply, Plaintiffs will assume that all of these Defendants are proceeding genuinely in a pro se capacity and that Danny Bates has not engaged in the unauthorized practice of law.

The Tennessee Court of Appeals, in opinions authored by now Justice Koch, has articulated how courts are to view pro se litigants and their filings. In Young v. Barrow, the following is set forth as "Standards for Reviewing Claims of Pro Se Litigants":

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. . . . The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. . . . However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

...

Pro se litigants should not be permitted to shift the burden of the litigation to the courts or to their adversaries.

² Defendant Sentinel Services Corporation has not filed a response. As set forth in the pending Motion for Summary Judgment filings, Sentinel Services Corporation is merely Danny Bates in "corporate form." Plaintiffs' Statement of Undisputed Facts ("SOF") (filed December 23, 2009) at ¶28. Danny Bates, in his Response, does not dispute that fact. Accordingly, Plaintiffs will consider the positions taken by Danny Bates in his Response to be Sentinel Services Corporation's positions as well. Otherwise, Sentinel Services Corporation has failed to respond to the pending Motion for Summary Judgment and, thus, has waived ability to object to entry of judgment against it as requested in the pending Motion.

They are, however, entitled to at least the same liberality of construction of their pleadings that Tenn. R. Civ. P. 7, 8.05, and 8.06 provide to other litigants. . . . Even though the courts cannot create claims or defenses for pro se litigants where none exist, . . . they should give effect to the substance, rather than the form or terminology, of a pro se litigant's papers. . . .

130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003) (internal ellipse noting omission of citations); see Hessmer v. Hessmer, 138 S.W.3d 901, 903-04 (Tenn. Ct. App. 2003); see also Slone v. Mitchell, 205 S.W.2d 469, 473 (Tenn. Ct. App. 2005, Susano, J.).

III. Summary Judgment Standard

Therefore, while their filings are viewed for substance as opposed to form, the Defendants nevertheless must comply with the substantive and procedural rules that apply to summary judgment practice under Rule 56 Tenn. R. Civ. P.

Under the recent Hannan v. Alltel Publishing Co. case, the burden of persuasion, in a motion for summary judgment context, remains on the movant -- in this case, the Plaintiffs. 2008 WL 4790535 at *3. The movant, when a plaintiff, must allege undisputed facts that show the existence of each element of the claim upon which he/she requests entry of summary judgment. Id. at *16 n.6. Upon doing that, which clearly Plaintiffs have done in this instance, the burden of production shifts to the non-movants -- the Bates and Mr. O'Brien -- to produce evidence of specific facts establishing that genuine issues of dispute concerning material facts exist as to the elements of that claim or those claims. Id. at *3-7. The non-movants -- the Bates and Mr. O'Brien -- cannot simply make arguments or present contentions or rely on their pleadings; rather they must demonstrate by affidavits, discovery materials or other probative evidence, that there is a genuine and material factual dispute that warrants trial. Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993).

Moreover, pursuant to Rule 56.03 Tenn. R. Civ. P., the non-movants -- the Bates and Mr. O'Brien -- must, in demonstrating dispute as to a particular fact set forth in Plaintiffs' Statement of Undisputed Facts, cite to a specific portion of the record that proves the fact as disputed. Rule 56.03 Tenn. R. Civ. P.

Respectfully, and as shown below, the Bates and Mr. O'Brien have not complied with the rules and standards that govern summary judgment practice -- and such cannot be excused even though they are proceeding pro se. Young, 130 S.W.2d at 63; Hessmer, 138 S.W.3d at 903. Otherwise, the burden of litigation, as well as the burden of production regarding the pending Motion for Summary Judgment, would unjustly be placed upon and reside with the Plaintiffs.

IV. Response of Danny Bates Provides No Reason or Grounds Upon Which to Deny Pending Motion for Summary Judgment

Plaintiffs' Motion for Summary Judgment seeks entry of judgment as against Danny Bates on three different claims: 1) conversion, 2) breach of fiduciary duties, and 3) fraudulent transfers. In his Response to that Motion, Danny Bates maintains that due to the fact that he was found guilty of two theft counts in State v. Bates, this pending Motion should be denied and the Complaint dismissed on grounds of 1) double jeopardy, and 2) res judicata (or perhaps more correctly, collateral estoppel). Respectfully, neither argument provides grounds upon which denial of the pending Motion can be based.

a) Double Jeopardy Has No Application

Danny Bates' position that double jeopardy prevents pursuit of this civil action is based upon his contention that conviction of a crime forecloses civil pursuit of the convicted person for the same act or actions. Respectfully, Danny Bates is incorrect. "Double jeopardy" prohibits being pursued, tried and punished criminally for actions

upon which an individual has previously been charged and tried in criminal court. See, e.g., State v. Conley, 639 S.W.2d 435, 436 (Tenn. 1982). Nothing about the “double jeopardy” doctrine prevents or prohibits the civil pursuit of an individual for matters upon he/she has been pursued criminally.³

b) **Res Judicata/Collateral Estoppel Has Application in This Matter, But Not the Application Urged by Danny Bates**

Danny Bates spends a good portion of his Response contending that his being found guilty of theft in State v. Bates “bars a second suit between the same parties and their privities on the same cause of action with respect to all issues which were or could have been litigated in the former suit.” Danny Bates’ Response at p. 5. Danny Bates’ “res judicata/collateral estoppel” argument is fallacious at numerous levels and for numerous reasons,⁴ but at its core, Danny Bates’ argument, that this civil action is foreclosed by States v. Bates, fails because Plaintiffs do not seek to re-litigate anything in this action that was litigated in the States v. Bates action. In fact, the exact opposite is true.

Plaintiffs, in this action, are using the finding of criminal guilt to establish -- not re-litigate -- the essential elements of the civil conversion claim against Danny Bates.

³ Indeed, this notion of civil pursuit after criminal prosecutions is so replete with newsworthy examples, it strains credibility to think that Danny Bates, even as a pro se litigant, is serious about his contention, or simply trying desperately to set up any “strawman” he can so as to avoid or delay answering civilly for what he has done and the injury he has caused -- e.g., O. J. Simpson being acquitted of criminal charge of murder in California state criminal court but being pursued and found guilty of wrongful death in California civil court.

⁴ For example, Danny Bates argues that because the Commissioner-in-Possession is the head of a state agency (i.e., Department of Financial Institutions) then he, Danny Bates, is being pursued in this action by “The State” just like he was prosecuted by “The State” in the criminal proceeding. Thus, in his mind, Danny Bates believes the “same party” is pursuing him twice. Respectfully, and in all due deference to Danny Bates’ pro se status, Mr. Bates’ contention on this point disregards the undisputed fact, rooted in T.C.A. §45-2-1502(b)(2), that the Commissioner-in-Possession is Sentinel Trust, not the criminal prosecutorial arm of the State of Tennessee. In addition and again respectfully, it is somewhat inconceivable that a man with the knowledge and sophistication of Danny Bates (while he might not like it) does not know and understand the difference.

Plaintiffs' right to do so, consistent with notions of res judicata and/or collateral estoppel, is firmly established as a matter of law by the cases cited and relied upon in their Motion for Summary Judgment filings. Plaintiffs' Memorandum of Law at p. 3 (filed December 23, 2009). Fascinatingly, Danny Bates -- in his Response at page 3 -- cites, apparently with approval, to the lead case on the issue, Ali v. Moore, 984 S.W.2d 224 (Tenn. Ct. App. 1998). But rather than foreclosing subsequent civil litigation, Ali makes clear that subsequent civil litigation can and does occur, and that matters found in relation to a criminal court guilty verdict prevent the criminal defendant from taking any contrary position in subsequent civil litigation. Ali, 984 S.W.2d at 229.

Therefore, all the matters found in relation to Danny Bates' theft of \$2.175 million are binding upon him in this civil action. That res judicata/collateral estoppel effect is not exactly what Danny Bates wants -- in his mind res judicata/collateral estoppel seems to mean that his being found guilty of theft creates some type of immunity from being pursued in civil court for conversion. Such, however, is a gross misapplication of res judicata/collateral estoppel. A jury verdict of guilty in a criminal setting can be used, and is used, in later civil proceedings to preclusively establish all the matters necessary to that criminal jury verdict. See, e.g., Smith v. SEC, 129 F.3d 356, 362-63 (6th Cir. 1997) (Smith was convicted of numerous counts of insider trading and the court, in a related civil action, recognized and found that "in order to prevail in the civil action, the SEC now needs only to move for summary judgment on the basis of the collateral estoppel effect of that conviction"); Rowe v. Marietta, 955 F. Supp. 829, 833 (W.D. Tenn. 1996) (criminal conviction of individual for securities fraud preclusively established elements of fraud in subsequent civil action). Accordingly, and as set forth in Plaintiffs' Motion

for Summary Judgment filings, Danny Bates' criminal theft convictions, and the res judicata/collateral estoppel effect drawn from them, undisputedly establish that he converted \$2.175 million from Sentinel Trust.

c) **Danny Bates Fails to Address Claims of Breach of Fiduciary Duty and Fraudulent Conveyance**

In an effort to show which of Plaintiffs' undisputed facts were related to his being found guilty of theft (and, thus, in his mind, foreclosed from being considered in this civil action), Danny Bates, literally, types out in his Response the Plaintiffs' undisputed facts, paragraph by paragraph, and then strikes through those facts which, to him, relate to his being convicted of two counts of theft of Sentinel Trust fiduciary funds. See Danny Bates' Response at pp. 11-23.

What is telling in relation to this exercise are the undisputed facts which Danny Bates does not strike through. See Danny Bates' Response at pp. 14-23 (generally Plaintiffs' SOF ¶¶13-43).⁵ Indeed, nowhere in Danny Bates' Response does he dispute any of the Plaintiffs' Statement of Undisputed Facts ¶¶13-43, which are the facts upon which Plaintiffs assert that judgment should be entered against Danny Bates as to their claims of breach of fiduciary duty and fraudulent conveyance of property.⁶ Accordingly, it is undisputed that Danny Bates violated fiduciary duties owed to Sentinel Trust, and in

⁵ Danny Bates does strike through references to the 205 Bastin Road house that occur in SOF 13, 14, 15, 19 and 21. Admittedly, the 205 Bastin Road house relates to Danny Bates' criminal conviction because he was found guilty of stealing the money from Sentinel Trust's fiduciary funds to build that house. However, the facts surrounding the 205 Bastin Road house also relate to Plaintiffs' claim that Danny Bates fraudulently transferred that house to his wife.

⁶ While Danny Bates types out language and strikes through language, Plaintiffs would emphasize that nowhere does Danny Bates challenge the correctness of any of the undisputed facts set forth in Plaintiffs' Statement of Undisputed Facts -- and certainly Danny Bates has not cited to evidence in the record to dispute anything stated and supported by Plaintiffs. What Danny Bates has done in his Response is strike through certain undisputed facts and declared the act of striking through those facts as ordaining them irrelevant to the action. Such faux dramatics fail to establish any dispute as to those facts and also fail to stand in the way of entry of summary judgment as requested in the pending Motion.

the process caused multi-million dollar injuries to Sentinel Trust. Likewise, it is undisputed that Danny Bates engaged in the fraudulent transfer of property without receiving reasonable equivalent value at a time when he knew or should have known that it was (or soon would be) beyond his ability to pay just and owing debtors, including Sentinel Trust.

The amounts of the injuries caused by Danny Bates, and the requested remedies against him, have not been challenged or addressed by him in his Response either. Therefore, summary judgment, as to the claims and as to the relief requested in the pending Motion, should be granted as against Danny Bates.

d) Danny Bates' Motion to Dismiss Complaint is Without Merit

As a matter of record, Plaintiffs note that Danny Bates' Response requests that the Complaint in this action be dismissed.⁷ It appears that the basis for this request is that Danny Bates believes that his criminal conviction of stealing money from Sentinel Trust dispenses with this lawsuit. As shown above, such contention is without merit.

Clearly, under Rule 12.02(6) Tenn. R. Civ. P., Plaintiffs' Complaint states a claim as to Danny Bates and, thus, to the extent the record needs clarification, Plaintiffs assert that Danny Bates' request that the Complaint be dismissed is without merit and, thus, should be denied.

⁷ It is a general request and it is uncertain as to whether Danny Bates seeks dismissal of the entire Complaint as to all Defendants, or only as to the claims against him. Because Danny Bates cannot practice law and cannot represent the other Defendants in this action, Plaintiffs assume that he seeks dismissal only as to himself.

V. Response of Deanna June Bates Provides No Reason or Grounds Upon Which to Deny Pending Motion for Summary Judgment

Plaintiffs' Motion for Summary Judgment seeks entry of summary judgment as against June Bates on two different claims: 1) conversion, and 2) unjust enrichment. June Bates' Response does not cite to any portion of the record to dispute any fact set forth in Plaintiffs' Statement of Undisputed Facts. The bulk of June Bates' Response "disputes" that certain facts are "relevant" to the claims against her -- of course, these facts which June Bates challenge as irrelevant predominately deal with the facts giving rise to summary judgment against other Defendants. So June Bates is largely correct that a lot of the facts were "irrelevant" in relation to the conversion and unjust enrichment claims against her.

Ms. Bates, however, is incorrect in urging that certain facts are not relevant to the claims against her. For example, June Bates maintains that Danny Bates' conviction for theft of the money used to build the 205 Bastin Road house is irrelevant to the claims against her. June Bates' Response at ¶1. Also, June Bates maintains that Danny Bates' transfer to her of his 100% interest in the 205 Bastin Road house is irrelevant to the claims against her. June Bates' Response at ¶¶13, 14, 20 and 21. Again, it should be noted that Ms. Bates does not dispute these facts, nor does she present evidence or citation to the record to support her position that these facts are irrelevant. She merely contends that they are irrelevant to the claims against her.

Respectfully, these two facts -- 1) that Danny Bates stole the money that built the 205 Bastin Road house from Sentinel Trust, and 2) that three weeks before the Commissioner-in-Possession took over Sentinel Trust, he quitclaimed to June Bates, without any consideration from her, his 100% ownership in that house and property -- are

at the core of the conversion and unjust enrichment claim against June Bates. Ms. Bates can try to say these facts are irrelevant. But her simply declaring such to be the case does not stand in the way of summary judgment when she cites to nothing in the record that shows dispute as to those facts.⁸

June Bates does go to great length in her Response to assert that she knew nothing of the criminal actions of her husband, nor did she know anything in relation to how Sentinel Trust was operated, nor did she know, generally, of what her husband, of almost 50 years, knew or didn't know at any particular point in time. June Bates' Response at ¶¶6, 12, 15 and 16.⁹ Yet as set forth in Plaintiffs' Motion for Summary Judgment filings, intent or knowledge is not an element of conversion.

To be liable for conversion, the defendant need only to have had an intent to exercise dominion and control, and does in fact exercise such dominion and control, over the property that is inconsistent with the plaintiff's right. Good faith or lack of knowledge of the plaintiff's rights by the "converter" is generally immaterial. Commerce Union Bank v. Welch, 29 Bankr 819, 823 (Bankr. M.D. Tenn. 1982); Mammoth Cave, 569 S.W.2d at 836. When property is received or purchased from a thief, even innocently, the innocent recipient/purchaser is liable to the rightful owner for the property stolen or the value thereof. Creach v. Ralph Nichols Co., 267 S.W.2d 132, 134-35 (Tenn. Ct. App. 1953); McDaniel v. Adams, 87 Tenn. 756, 757-58, 11 S.W. 939 (Tenn. 1898).

Plaintiffs' Memorandum of Law in Support (filed December 23, 2009) at pp. 6-7.

Moreover, the same is true regarding unjust enrichment -- a degree of scienter or knowledge of wrongdoing is not required; all that is required is that a benefit be

⁸ Interestingly, in her Response, June Bates does not contest or otherwise dispute that the \$1.6 million taken from Sentinel Trust bank accounts was used to build the house that she has, since April 23, 2004, been 100% owner of. June Bates' Response at ¶6. It is, of course, this money that Danny Bates was found guilty of sealing from Sentinel Trust. SOF at ¶6.

⁹ Even on this point of her lack of knowledge, June Bates merely makes statement and does not present any evidence or citation to the record regarding her lack of knowledge of her husband's activities.

conferred and accepted and that it is inequitable for the benefit to continue. Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc., 160 S.W.3d 874, 882 (Tenn. Ct. App. 2004). Therefore, even accepting them as true, June Bates' statements that she knew nothing, does not stand in the way of entry of summary judgment relating to the claims of conversion and unjust enrichment against her.

As a final position in her Response, June Bates suggests that she had a pre-existing and enforceable marital interest in the 205 Bastin Road property even before Danny Bates' April 23, 2004 quitclaim to her. Basically, it appears that June Bates contends that Danny Bates' recordation and maintenance of himself as 100% owner of the 205 Bastin Road property did not work a "coverture"¹⁰ or, perhaps a forfeiture, of some marital interest Ms. Bates asserts she had in the property. Plaintiffs suppose that June Bates is arguing that because she had some percentage interest in the 205 Bastin Road property to begin with, she, therefore, did not convert that portion of the property and is not unjustly enriched as to her retaining that portion. Respectfully, in addition to providing no factual support for the assertions, June Bates is simply wrong that she had an existing, quantifiable and/or enforceable interest in the 205 Bastin Road property prior to Danny Bates' April 23, 2004 quitclaim to her.

In June 1993, Danny Bates filed, as an individual, -- i.e., without his wife, June Bates filing jointly -- for Chapter 7 (liquidation) bankruptcy protection. SOF ¶8. The 205 Bastin Road property (which at that time had not had the multi-million dollar house built on it) was listed in schedules, sworn to by Danny Bates, as being owned "in fee"

¹⁰ "Coverture" means "in the state of being married" and typically refers to the legal disabilities from which a wife suffered due to the fact she was a married woman -- e.g., not having rights to property. Black's Law Dictionary (5th Ed.) at p. 330. Coverture has been abolished in Tennessee since 1913. See Historical Notes and Caselaw Annotations to T.C.A. §36-3-504.

(i.e., 100%) by him. See Exhibit 32 attached to Notice of Filing filed herewith.¹¹ June Bates made no objection in the bankruptcy proceeding and certainly did not assert, at that time, any interest to the Lewis County property, marital or otherwise. Accordingly, Ms. Bates waived any ability to later claim that she had an interest in that property. See In re: Allnutt, 220 B.R. 871, 878, 889-90, 893 (Bankr. D.Md. 1998). It is undisputed that Danny Bates -- and he alone -- bought the 205 Bastin Road property out of his own bankruptcy liquidation in April 1994 and in doing so, put himself as 100% titled and recorded owner of that property. SOF ¶¶9-10; Danny Bates' Response at p. 13 (¶9) and June Bates' Response at p. 2 (¶9). Over the next several years, Danny Bates stole at least \$1.6 million from Sentinel Trust's fiduciary funds and built a large house on that property. SOF at ¶6. June Bates has never, either prior to Danny Bates' bankruptcy or after it, been noted as having any interest in the 205 Bastin Road property¹² -- until Danny Bates quitclaimed it to her on April 23, 2004. There has been no tenancy-by-the-entireties estate on that property at any time. Danny Bates owned it outright and disposed of it as he saw fit. And, of course, it is undisputed that what he saw fit to do was, at the eleventh hour, quitclaim his 100% interest in the property, with its multi-million dollar house built with stolen funds, to his wife.

¹¹ Schedule A -- Real Property is the first page of Exhibit 32. In that Schedule, Danny Bates swears that 184 acres in Lewis County were owned by him "in fee" (i.e., not jointly or by-the-entireties). These 184 acres are the three tracts of land that were subject to the Bankruptcy Trustee's disposition and which Danny Bates "brought out of his own bankruptcy," including the 205 Bastin Road property. SOF at ¶9 and Exhibit 10 to Motion. Schedule A of these "sworn to" bankruptcy schedules also undisputedly reveals that Danny Bates knew the difference between the land he owned and the land he and his wife owned jointly because listed on that schedule is a Nashville property which he clearly notes as being jointly held as between him and his wife.

¹² Moreover, under the rationale stated in In re: Allnutt, Plaintiffs' assert that Ms. Bates is estopped from claiming any such interest. 220 B.R. at 893.

No doubt June Bates is Danny Bates' wife of almost 50 years, but that does not mean that Danny Bates could not, and did not own property outright in his own name. It is undisputed that Danny Bates owned outright the 205 Bastin Road property and house until April 23, 2004. SOF at ¶9. Because it was owned outright by Danny Bates, at most, Ms. Bates could only have had, prior to April 2004, an expectancy interest in the 205 Bastin Road property and the multi-million dollar house -- an expectancy interest that would be quantifiable and realized only upon the death of Danny Bates (and even that would depend on the nature of his estate as a decedent¹³) or upon a divorce between Mr. and Mrs. Bates (and even that would have depended upon whether or not the property was adjudicated as marital¹⁴). Neither death or divorce occurred prior to Danny Bates' quitclaim of 100% of the 205 Bastin Road property to June Bates. Therefore, it is incorrect for Ms. Bates to urge that she had some pre-existing, quantifiable and enforceable rights to the property while it was singularly owned by and titled to Danny Bates. Indeed under the above-referenced In re: Allnutt case, Ms. Bates is estopped from taking that position. 220 B.R. at 893. Thus, Ms. Bates' contention -- and again nothing is cited to in the record to support that contention -- that she had some ill-defined marital right in something 100% owed by Danny Bates does not present any factual dispute that she is a converter of the Sentinel Trust funds that built the multi-million dollar house that

¹³ In an intestate situation, interest in real property owned by the decedent vests in a decedent's heirs only upon the death of the decedent. T.C.A. §31-2-103. In the context of a Will, real property interests pass, as per the provisions of the Will, at the testator's death, unless contrary intention appears clearly in the language of the Will. T.C.A. §32-3-101.

¹⁴ See Smith v. Smith, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002).

she now owns 100% debt-free¹⁵ and that she has been unjustly enriched and will be unjustly enriched if allowed to retain ownership of that house/property.

Finally, and perhaps at a more basic level, even if June Bates had a marital interest in the 205 Bastin Road property, she simply cannot avoid, sidestep or ignore that a multi-million dollar home was built on that property with funds stolen by her husband from Sentinel Trust. Again, when property is received by you from a thief (even if that thief is your husband), you are liable to the rightful owner for the property stolen or the value of the property stolen; otherwise the recipient is a “converter” of the property. See Creach v. Ralph Nichols Co., 267 S.W.2d 132, 134-35 (Tenn. Ct. App. 1953). Put another way, just because the wife of a thief is given, from her husband, \$1.6 million worth of stolen goods does not mean that the wife can claim any portion of those stolen goods (or the value thereof) as marital property. Rather, if she keeps that stolen property, then she has converted it and is unjustly enriched for as long as she keeps it from its rightful owner.

Accordingly, June Bates has not presented any reason or grounds for denial of the pending Motion and judgment should be entered against her as requested therein.

VI. Responses of Defendants Todd Bates and Gary O’Brien Provide No Reason or Ground to Deny Pending Motion for Summary Judgment

Plaintiffs’ Motion for Summary Judgment seeks judgment against Defendant Todd Bates and Gary O’Brien on the claim that those Defendants, who were directors of

¹⁵ Interestingly, while June Bates contends that she had an existing and enforceable marital interest in something that was 100% titled to Danny Bates’ name, Danny Bates does not think that he has an existing and enforceable marital interest in something that is 100% titled in June Bates’ name. It is Plaintiff’s understanding that in response to efforts to establish a payment schedule for the \$600,000 criminal restitution, Danny Bates has stated that he has no interest in the 205 Bastin Road house, it being 100% owned by his wife, June Bates. This inconsistency underscores the fallacy of June Bates’ position and, of course, brings into sharp focus the reason for the transfer to June Bates.

Sentinel Trust, breached fiduciary duties owed to Sentinel Trust Company. Plaintiffs'

Motion as to Todd Bates and Gary O'Brien is based on the following facts:

- a) Todd Bates and Gary O'Brien were directors of Sentinel Trust from December 30, 1999 until Sentinel Trust was taken possession of by the Commissioner-in-Possession on May 18, 2004 (SOF ¶37);
- b) Todd Bates and Gary O'Brien admit that while they were directors, Sentinel's practice of borrowing monies on deposit in the pooled fiduciary account from non-related bond issues to fund the expenses of defaulted bond issues caused a significant deficiency in cash in the Sentinel Trust pooled fiduciary account (SOF ¶39); and
- c) Todd Bates and Gary O'Brien admit that prior to the Commissioner-in-Possession taking possession of Sentinel, they engaged in practices that i) violated the Tennessee Banking Act, ii) violated the FDIC's Statement of Principles of Trust Department Management which Sentinel adopted as part of its corporate policy, and iii) violated the indentures and contractual agreements between the bond issuers and Sentinel as fiduciary (SOF ¶39).

In their respective Responses -- which are identical "cut and paste" copies of each other -- Todd Bates and Gary O'Brien do not dispute these facts. See Todd Bates' Response at ¶¶37 and 39; Gary O'Brien's Response at ¶¶37 and 39.

As a matter of law, as directors of Sentinel Trust, Todd Bates and Gary O'Brien owed fiduciary duties to Sentinel Trust. Efrid v. Clinic of Plastic and Reconstructive Surgery, P.A., 147 S.W.3d 208, 221 (Tenn. Ct. App. 2003). It is undisputed factually that they breached those duties and that a significant deficiency in cash in the pooled fiduciary account resulted from those breaches. See In re: Sentinel Trust, 206 S.W.3d at 525.

In their Responses, Todd Bates and Gary O'Brien dispute that there "is or should be a \$4.395 million shortfall in fiduciary funds." Todd Bates' Response at ¶42; Gary O'Brien's Response at ¶42. Of course, neither Todd Bates or Gary O'Brien cite to anything in the record to evidence the basis for their disputing that fact. Accordingly,

their “dispute” is simply a bald, unsupported assertion, insufficient to stand in the way of summary judgment being entered against them.

Moreover, while Todd Bates and Gary O’Brien dispute, without any support, whether there is a \$4.395 million shortfall in fiduciary funds, they both admit that “the prior use of fiduciary funds for defaulted bond issues had created a fiduciary cash shortfall” and that at the time of the Commissioner-in-Possession takeover of Sentinel Trust (i.e., after they had served on Sentinel Trust’s Board of Directors for four and one-half years), “the deficiency in the pooled fiduciary account was between \$5.8 million and \$7.25 million.” Todd Bates’ Response at ¶¶17-18; Gary O’Brien’s Response at ¶¶17-18. Therefore, it is undisputed that a multi-million dollar shortfall existed in Sentinel Trust pooled fiduciary account a) while Todd Bates and Gary O’Brien were directors, and b) while they were engaging in practices which violated fiduciary duties and which caused the “significant deficiency,” which, in turn, supports what is also undisputed in the record: the amount of the shortfall is approximately \$4.395 million. SOF at ¶42.¹⁶ Todd Bates and Gary O’Brien simply contending that it is not so -- and that is exactly what they do on this point through their unsupported urgings -- does not provide reason or grounds to deny summary judgment. Put differently, when confronted with the facts and law set forth in Plaintiffs’ pending Motion, Todd Bates and Gary O’Brien admit as to

¹⁶ Proof of amount of damages need not rise to the level of absolute certainty. Rather the goal of establishing an amount of damages is to restore the injured party, as nearly as possible, to the position that party would have been in but for the breach of fiduciary duty. See Waggoner Motors, Inc. v. Waverly Church of Christ, 159 S.W.3d 42, 57 (Tenn. Ct. App. 2004). In this instance, the Bryant Affidavit, which is attached as Exhibit 27 to the Motion for Summary Judgment, sets forth, with reasonable certainty, the undisputed facts of the current deficiency in the pooled fiduciary account. Ms. Bryant’s factual assertions are based upon numbers presented to this Court through motions which were subject to objection from the Bates and Mr. O’Brien and have been approved and otherwise used in final orders of this Court.


liability and simply have not come forward and presented genuine dispute of material fact regarding the injury caused by their actions/inactions.

Accordingly, Plaintiffs assert that summary judgment should be entered against Clifton T. Bates and Gary L. O'Brien for their breach of fiduciary duties which were owed to Sentinel Trust Company, and a joint and several award of \$4.395 million should be entered against them, as requested in the pending Motion.

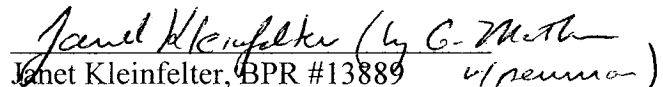
VII. Conclusion

For the reasons set forth herein, and in the previously filed Motion for Summary Judgment papers, Plaintiffs request entry of an Order from this Court granting all the relief requested in their Motion for Summary Judgment as to Various Claims Against Various Defendants filed December 23, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served upon the following, via U.S. Mail and by Federal Express as noted, on this the 12th day of February, 2010.

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